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No. 80-1750

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

31.72 ACRES OF LAND, MORE OR LESS, ALICE DAY ROHNS, MARGARET DAY TRAVIS, MARION DAY WARNES, DAVID H. DAY III, SUSAN S. DAY, ROBERT H. H. DAY, NELLIE B. DAY, HELEN G. DAY, WILLIAM PHILLIPS as Executor of the Estate of Estelle Day Phillips, and EVA DAY LEBER,
Petitioners,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Robert F. Travis
BAUCKHAM, REED, LANG, SCHAEFER & TRAVIS, P.C.
Business Address:
500 Park Building
Kalamazoo, Michigan 49007
Telephone: (616) 382-4500
Counsel of Record for Petitioners

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the Court of Appeals for the Sixth Circuit is in conflict with the opinion of this Honorable Court in *Evans* v *Abney*, 396 US 435 (1970)?

II. Whether the decision of the Court of Appeals for the Sixth Circuit reflected an incorrect interpretation of Michigan law, in light of the case of *Baldwin Manor* v *City of Birmingham*, 341 Mich 423; 67 NW2d 812 (1954)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, 31.72 Acres of Land, more or less, Alice Day Rohns, Margaret Day Travis, Marion Day Warnes, David H. Day III, Susan S. Day, Robert H. H. Day, Nellie B. Day, Helen G. Day, William Phillips as Executor of the Estate of Estelle Day Phillips, and Eva Day Leber pray for issuance of a writ of certiorari to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 21, 1981.

OPINIONS BELOW

The Order for the United States Court of Appeals for the Sixth Circuit is an unpublished Order entered January 21, 1981. A copy of the Order is included in the appendix. No separate opinion was issued; the three page Order contained the reasoning of the Court of Appeals.

The Order of the Sixth Circuit affirmed an order of the United States District Court for the Western District of Michigan entered in its Case No. 77-282 on April 7, 1980. The District Court's Order was also unpublished. A copy appears in the appendix.

CONCISE STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to hear this case on certiorari under 28 USC §1254(1). A written Order was issued by the United States Court of Appeals for the Sixth Circuit on January 21, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None at issue.

CONCISE STATEMENT OF THE CASE

On November 20, 1920, David H. Day and Eva H. Day conveyed the subject property by warranty deed to the State of Michigan. The grant of land was made subject to the following condition:

> . . . to be used for a public state park, should the same be abandoned for that purpose, it shall revert to the party of the first part [David H. Day and Eva H. Day], their heirs and assigns.

The land was held by the State of Michigan and was used from 1920 to 1975 as the D. H. Day State Park.

On October 21, 1970, the United States Congress enacted the Sleeping Bear Dunes National Lakeshore Act, 16 U.S.C. §§460x et seq. This Act, among other things, directed the Secretary of the Interior to acquire by donation "those lands owned by the State of Michigan within the boundaries of the area designated for inclusion in the lakeshore . . ." 16 U.S.C. §460x-1. This area included the land deeded to the State of Michigan by David H. Day and Eva H. Day.

From and after October 21, 1970, the Secretary began acquiring land within the boundaries of the Lakeshore. Much of the land was purchased from private owners, and some lands were acquired by the filing of complaints in condemnation. By Act No. 359 of the Public Acts of 1974, MCLA §§3.901 et seq.; MSA 13.766(1) et seq., the Michigan legislature authorized the Michigan Department of Natural Resources to, among other things, convey to the United States "by quit-claim deed or deeds the title to lands as is vested in the state and under the jurisdiction of the department of natural resources . . . which lie within the boundaries of the lakeshore zone and the parkway locations of the Sleeping Bear dunes national lakeshore. . .".

Notwithstanding this state legislation, no deed for the subject property was executed. Nevertheless, on April 1, 1975, the United States Department of Interior, by and through its agents, servants, and employees, took possession of the subject park land and has remained in possession ever since. On or after that date, the park has been manned by employees of the Department of Interior and not State employees. Decisions relating to park management have been made by the United States and not by the State of Michigan. Changes have also been made to the park, although the use of the park did not change. Prior to April 1, 1975, the State of Michigan operated the park as a public campground, charging fees to the public; subsequent to April 1, 1975 and up to the present time, the property has been used as a public campground, with fees charged to members of the public.

On May 1, 1975 the State of Michigan, through its Department of Natural Resources, granted full and exclusive jurisdiction over the subject property to the Sleeping Bear Dunes National Lakeshore. By this act the State did not relinquish title to the property; it only authorized the National Park Service to make such use of the property as would have occurred if a deed could have been delivered. The term of this grant was one year from the date of April 1, 1975 and year-to-year thereafter until terminated by the delivery of a deed. The permit conditioned delivery of the deed on the satisfactory removal of the remainderman interest which D. H. Day and Eva H. Day reserved for themselves and their heirs in the 1920 deed. (The foregoing is taken in its entirety from the Statement of Facts by the District court. The Statement of Facts in the Order of the Court of Appeals for the Sixth Circuit does not differ materially).

After the U.S. went into possession, it began the solicitation of quit claim deeds from the heirs of D. H. and Eva H. Day. By agreement of the parties, the present suit was commenced by the U.S. in June of 1977 in order to

resolve the issues for all concerned. The State and Federal officials dealing with the land had been aware of the reverter clause and the controversy relating to that clause well before taking any actions concerning the property.

The case was argued before the Honorable Noel P. Fox on stipulated facts. The District court, in an opinion filed April 7, 1980, ruled in favor of the U.S., on the ground that the voluntary transfer of the park to the federal government did not amount to a "real and substantial violation" of the condition embodied in the deed.

The Day heirs appealed to the Sixth Circuit Court of Appeals, which, on January 21, 1981, issued a three page Order briefly summarizing the facts and affirming the District Court.

To provide a convenient reference for the Court, petitioners set forth the following timetable of events:

1. *November 20, 1920.* Deed by D.H. Day and Eva Day.
2. *1920-1975.* Use of the land as a "public state park."
3. *October 21, 1970.* Effective date of 16 USC 460x, the Sleeping Bear Dunes National Lakeshore" Act.
4. *December 23, 1974.* Effective date of 1974 Michigan Public Act 359, the "Sleeping Bear Dunes National Lakeshore Park" Act.
5. *April 1, 1975.* The State of Michigan voluntarily yields possession and control over the park to the U.S.; possession and control is assumed by the U.S.
6. *May 1, 1975.* LICENSE AND PERMIT FOR FEDERAL USE OF STATE REAL PROPERTY is issued by the State of Michigan, authorizing the U.S. National Park Service to

make such use of the land as would have occurred if the land had been deeded to the U.S. on April 1, 1975.

7. *April 1, 1976.* U.S. solicits quit claim deeds from Day heirs; requests were subsequently denied by all Day heirs.
8. *June 9, 1977.* The instant suit was filed by the U.S. to condemn the reversionary interests of the Day heirs.
9. *April 7, 1980.* District court issues Opinion and Order; Day heirs appeal.
10. *January 21, 1981.* Sixth Circuit Court of Appeals issues Order affirming the District Court.

The heirs of D.H. and Eva H. Day now bring to this Court their Petition for Certiorari under 28 USC 1254(1).

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE DISTRICT COURT, AS AFFIRMED BY THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, IS IN CONFLICT WITH THE OPINION OF THIS COURT IN *EVANS* v *ABNEY*, 396 US 435 (1970).

In *Evans* v *Abney*, 396 US 435 (1970), this Court upheld the reversion of a public park which had been dedicated as a public park exclusively for the use of members of the white race. When segregated parks became unlawful, it was held that the land would revert to the heirs of the donor, rather than becoming a park for the use of the entire public. In upholding this decision, this Court said at 396 US 447:

> " . . . the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of

> freedom of testation, like most things, has its advantages and disadvantages. The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations."

The exact motives of the donor in the case at bar are lost in antiquity. However, the record is sufficient to show that D. H. Day was a rugged individualist with strong emotional ties to the State of Michigan and to its park system, and that he was well aware of the existence and the nature of the federal park system, as well as other kinds of public parks then in existence, such as city, township and county parks. (15a, 16a, 17a)

In its decision, the District Court in effect removed the word "state" from the limitation in the deed; "to be used for a public *state* park." (emphasis supplied)

If this had been the intent of the donor, the word "state" could easily have been omitted from the carefully-drawn deed, as the sentence or phrase is complete without it.

As will be shown in the comments below, this created a result contrary to Michigan common law from and after the 1954 Michigan Supreme Court decision of *Baldwin Manor* v *City of Birmingham*, 341 Mich 423; 67 NW2d 812.

II. THE DECISION OF THE DISTRICT COURT, AS AFFIRMED BY THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, WAS CONTRARY TO MICHIGAN COMMON LAW FROM AND AFTER THE 1954 MICHIGAN SUPREME COURT DECISION OF *BALDWIN MANOR* v *CITY OF BIRMINGHAM*, 341 MICH 423; 67 NW2d 812 (1954).

The District Court and the Court of Appeals for the 6th Circuit relied entirely for their interpretation of Michigan

common law on two cases: *Clark* v *City of Grand Rapids*, 334 Mich 646; 55 NW2d 137 (1952), and *Central Land Company* v *City of Grand Rapids*, 302 Mich 105; 4 NW2d 485 (1942).

Neither court discussed the applicability of the later Michigan case of *Baldwin Manor* v *City of Birmingham*, supra, 341 Mich 423; 67 NW2d 812 (1954), although petitioners had extensively briefed this case before both courts.

In addition to being a more recent decision, *Baldwin Manor*, supra, bore more directly on the issues in the case at bar than the two cases relied upon, cited above.

It is respectfully submitted that the result of this selection of cases was "to legislate social policy on the basis of . . . [the court's] own personal inclinations" rather than "to construe and enforce the constitution and laws of the land as they are" as mandated by this Court in the language of *Evans* v *Abney*, supra, 396 US 435 (1970), quoted on page 5 of this Petition.

In *Baldwin Manor* v *City of Birmingham*, 341 Mich 423; 67 NW2d 812 (1954), supra, the Michigan Supreme Court quoted with approval from 39 Am Jur 816, 817, Parks, Squares, and Playgrounds, §21, as follows:

> "A different construction is placed on dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted." [341 Mich 430; 67 NW2d 815].

This distinction makes sense. In the case of a public dedication, various members of the public may hold differing views on the ends to be served by the dedication, and many may be unaware of the transaction. The terms of the deed would not ordinarily be reviewed by the "public" after it was drafted. A private donor, however, speaks with

one voice, presumably has strong views on the subject of any reservations, and sees the language of the deed at the time of its execution, at a minimum.

The *Baldwin* court also said at 341 Mich 430, 67 NW2d 815:

> "[2] Likewise, in 26 C.J.S., Dedication, §65, pages 154, 155, it is said:
>
> 'Except as appears below, if a dedication is made for a specific or defined purpose, neither the legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication; and this rule is not affected by the fact that the changed use may be advantageous to the public. This can only be done under the right of eminent domain.' "

The Court at 67 NW2d 815 quoted with approval language from a Massachusetts case to the effect that land may not be appropriated without compensation to a public use inconsistent with the use originally intended.

Baldwin Manor, supra, consists of 9 pages of dense reading. Countless cases, nearly all of which are applicable to the case at bar, are examined in depth.

Perhaps the most interesting case examination is at 67 NW2d 816, where the Michigan Supreme Court quotes a Kentucky case at length and with approval. To adapt this language to the case at bar, it is only necessary to insert the word "state" in the phrase "public park" and to substitute "federal park" for the phrase "public library". Beyond that, all that is required is to change the name of the donor of the park, and that case becomes this case.

In *Central Land Company* v *City of Grand Rapids*, supra, 302 Mich 105; 4 NW2d 485 (1942), one of the two

somewhat earlier cases relied on by the courts below, the Michigan Supreme Court indicated at 4 NW2d 486 that "the factual background of the case must be borne in mind." The case turned on two rather compelling facts, both of which distinguish *Central Land Company*, supra, from *Baldwin Manor*, supra, and the case at bar.

In the *Central Land Company* case a commercial company conveyed land to the City of Grand Rapids in exchange for various considerations which the court found to be worth in excess of $400,000.00. A reverter clause in the deed required the land to "be used solely for park, highway, street or boulevard purposes." All went well until the City entered into a contract with a third party providing for the drilling for oil on the land; grantor began an action in ejectment.

In addition to emphasizing the consideration of $400,000.00 the City had given for the land, the court found the following facts at 4 NW2d 487:

> "Defendants have taken rather extraordinary care in so operating the oil wells on the park property that this activity does not materially impair the use of the land for the purposes for which it was conveyed to the city. No storage tanks are maintained on the property, but instead they are somewhat distantly located on other property. The pipelines leading from the wells to the storage tanks are for the most part, if not wholly, laid underground in the park area, excepting where such pipes extend along or across the highway passing through the park. Only a small, and not particularly unsightly or objectionable, structure is maintained at the location of each well. These buildings are not of a different character than an ordinary tool house or comfort station, such as are commonly maintained in park areas . . . One more rather important aspect of the record is the testimony that oil production on these premises probably will not continue for more than

> approximately two years; and the value of the total estimated production will probably not exceed one-twentieth of the amount expended by the defendant city incident to improving the park property and constructing roadways."

The court then held that the interference with the purpose required by the reverter clause was insufficient to constitute a breach of the condition subsequent.

It must be questioned whether this case has any substantial degree of materiality to the case at bar, where the land was donated, and where the condition subsequent was admittedly breached.

Clark v *City of Grand Rapids,* supra, 334 Mich 646; 55 NW2d 137 (1952) is even more inapposite. In that case a deed which granted land to the city contained numerous conditions, one of which was the use of the land for park and recreation purposes. The deed, however, contained no reverter clause which appeared to apply to the condition that the land must be used as a park, and the court held that the lack of such a clause in the deed was fatal to the claim in ejectment. The court held also that the degree of neglect of the property present in that case was not sufficient to constitute an abandonment.

It is hard to imagine how that case could bear on the case at bar, other than as dicta.

It is respectfully submitted that the later case of *Baldwin Manor* v *City of Birmingham*, supra, clearly represents the applicable state law in this matter, and that the misapplication of Michigan common law by the district court and as affirmed by the Court of Appeals for the Sixth Circuit brought a result contrary to the mandate of this court in *Evans* v *Abney,* supra, as quoted on page 5 of this Petition.

It is further submitted that this case would be a most appropriate case for review by this Court, in order to

further the compliance by lower courts with the mandates of this Court.

CONCLUSION

For the reasons stated, Petitioners respectfully urge that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
Robert F. Travis
BAUCKHAM, REED, LANG,
SCHAEFER & TRAVIS, P.C.
Business Address:
500 Park Building
Kalamazoo, Michigan 49007

APPENDIX

No. 80-1303
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

31.72 ACRES OF LAND, MORE OR LESS, ET AL,
Defendants,

ALICE DAY ROHNS, MARGARET DAY TRAVIS, MARION DAY WARNES, DAVID H. DAY III, SUSAN S. DAY, ROBERT H. H. DAY, NELLIE B. DAY, HELEN G. DAY, WILLIAM PHILLIPS as Executor of the Estate of Estelle Day Phillips, and EVA DAY LEBER,
Defendants-Appellants.

Before: MARTIN, Circuit Judge; PHILLIPS and CELEBREZZE, Senior Circuit Judges.

ORDER
(Filed: January 21, 1981)

The heirs of David H. Day, the first Michigan Director of Parks, appeal the District Court finding that a possibility of reverter did not ripen when the State of Michigan transferred jurisdiction of a state park to the United States for continued use as a park.

The property was conveyed to the State of Michigan in 1920 by David H. Day and Eva H. Day. The deed contained the provision that the land was "to be used for a public state park, should the same be abandoned for that purpose, it shall revert to the party of the first party, their heirs and assigns." The land was used by the State of Michigan as a state park named after Mr. Day from 1920 until 1975.

Order

In 1970 the United States Congress enacted the Sleeping Bear Dunes National Lakeshore Act, 16 U.S.C. § 460, *et seq.*, which directed the Secretary of the Interior to acquire by donation those lands owned by the State of Michigan within the boundaries of the area designated for inclusion in the lakeshore. The subject property rested within those boundaries. On May 1, 1975, the State of Michigan issued a permit granting jurisdiction over the subject parkland to the National Park Service to make use of the land as if a deed had been delivered. The permit contained the express condition that delivery of the deed is subject to the satisfactory removal of the remainderman interest reserved by the Days in the original deed. The term was for one year renewable annually until a deed could be delivered. The United States continues to operate the park as a public campground charging fees to the public, retaining the park's name in honor of Mr. Day.

The District Court conducted exhaustive research to grasp the historical context in which the grant was given. This research revealed the word "state" was inserted in the original deed because of Mr. Day's connection with and desire to help the fledging state park system of the time. The court cited well-settled Michigan law that conditions such as in the present case are strictly construed so as to prevent forfeiture, *see Clark* v. *City of Grand Rapids*, 334 Mich. 646 (1952), and a court must find a real and substantial violation of the condition embodied in the deed, *Central Land Co.* v. *City of Grand Rapids*, 302 Mich. 105 (1942). The Court concluded that the action here did not interfere materially with the donor's primary intent, to make a gift to all the people of the State so they could enjoy and use the property. We agree.

The decision of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman,
Clerk

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. G77-282 C.A.

31.72 ACRES OF LAND, more or less, in Leelanau County, State of Michigan; ALICE DAY ROHNS, et al., and unknown owners,
Defendants.

OPINION
(Filed: April 7, 1980)

This condemnation action involves a 31.72 acre parcel of land which the United States seeks to make a part of the Sleeping Bear Dunes National Lakeshore. The central question involves a possibility of reverter, which former owners of the property placed in a deed to the property, and whether this reverter ripened so as to vest the heirs of these owners with fee title. Defendants argue that this has occurred and that the government must compensate them for the taking of the fee estate; the United States argues otherwise. Both sides have stipulated to a set of facts and filed motions for summary judgment so that this issue can be resolved.

On November 20, 1920, David H. Day and Eva H. Day conveyed the subject property by warranty deed to the State of Michigan. The grant of land was made subject to the following condition:

> . . . to be used for a public state park, should the same be abandoned for that purpose, it shall revert

> to the party of the first part [David H. Day and Eva H. Day], their heirs and assigns.

The land was held by the State of Michigan and was used from 1920 to 1975 as the D. H. Day State Park.

On October 21, 1970, the United States Congress enacted the Sleeping Bear Dunes National Lakeshore Act, 16 U.S.C. §§460x et seq. This Act, among other things, directed the Secretary of the Interior to acquire by donation "those lands owned by the State of Michigan within the boundaries of the area designated for inclusion in the lakeshore. . . ." 16 U.S.C. §460x-1. This area included the land deeded to the State of Michigan by David H. Day and Eva H. Day.

From and after October 21, 1970, the Secretary began acquiring land within the boundaries of the Lakeshore. Much of the land was purchased from private owners, and some lands were acquired by the filing of complaints in condemnation. By Act No. 359 of the Public Acts of 1974, M.C.L.A. §§3.901 et seq.; M.S.A. 13.766(1) et seq., the Michigan Legislature authorized the Michigan Department of Natural Resources to, among other things, convey to the United States "by quit-claim deed or deeds the title to lands as is vested in the state and under the jurisdiction of the department of natural resources . . . which lie within the boundaries of the lakeshore zone and the parkway locations of the Sleeping Bear dunes national lakeshore. . . ."

Notwithstanding this state legislation, no deed for the subject property was executed. Nevertheless, on April 1, 1975, the United States Department of Interior, by and through its agents, servants, and employees, took possession of the subject park land and has remained in possession ever since. On or after that date, the park has been manned by employees of the Department of Interior and not State employees. Decisions relating to park

management have been made by the United States and not by the State of Michigan. Changes have also been made to the park,[1] although, the use of the park did not change. Prior to April 1, 1975, the State of Michigan operated the park as a public campground, charging fees to the public, subsequent to April 1, 1975 and up to the present time, the property has been used as a public campground, with fees charged to members of the public.

On May 1, 1975 the State of Michigan through its Department of Natural Resources, granted full and exclusive jurisdiction over the the subject property to the Sleeping Bear Dunes National Lakeshore. By this act the State did not relinquish title to the property; it only authorized the National Park Service to make such use of the property as would have occurred if a deed could have been delivered. The term of this grant was one year from the date of April 1, 1975 and year-to-year thereafter until terminated by the delivery of a deed. The permit conditioned delivery of the deed on the satisfactory removal of the remainderman interest which D. H. Day and Eva H. Day reserved for themselves and their heirs in the 1920 deed.

---

[1] The changes made by the United States include the removal of a sign at the entrance to the park which read,

ENTRANCE
D. H. DAY
STATE PARK
DEPARTMENT
NATURAL RESOURCES

and substitution of a sign which reads,

ENTRANCE
D. H. DAY
CAMPGROUND
SLEEPING BEAR DUNES NATIONAL LAKESHORE
UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

The Department of Interior has also removed various buildings, toilet facilities, signs, and other fixtures within the park, and partially replaced these with other arrangements. It has also retained all camping fees and other profits earned since April 1, 1975.

After the United States went into possession, it began the solicitation of quit-claim deeds from the heirs of D. H. and Eva Day. Such deeds could not be voluntarily obtained, and the present suit was commenced in June of 1977, with these heirs as defendants. They contend that the State of Michigan's actions prior to this date resulted in the abandonment of the subject property as a state park and this triggered their possibility of reverter so that now they possess the fee title for which they must be compensated if it is to be condemned.

It is a general rule that in determining if a reverter has occurred, changes in the use of the land which result from the condemnation proceedings must be disregarded. The Restatement of Property best states this rule:

> If viewed from the time of the commencement of an eminent domain proceeding and not taking into account any changes in the use of the land sought to be condemned which may result as a consequence of such proceeding, the event upon which a possessory estate in fee simple defeasible is to end is an event the occurrence of which, within a reasonably short period of time, is not probable then the damages for a taking thereof by an eminent domain proceeding are ascertained as though the estate were a possessory estate in fee simple absolute and the entire amount thereof is awarded to the owner of the estate in fee simple defeasible. Under these circumstances the future interest has no ascertainable value.

1 Restatement of Property, §53(b), p. 187 (1936). Other authorities are to the same effect, namely that changes occasioned by condemnation will not cause a possibility of reverter to ripen unless other conditions, independent of the condemnation, would have made the reversion imminent. *See, e.g., Midwestern Developments, Inc.* v. *City of Tulsa,* 374 F.2d 683 (10th Cir. 1967); *Terminal Coal Co.* v. *United*

States, 172 F.2d 113 (3rd Cir. 1949); *Woodville* v. *United States*, 152 F.2d 735 (10th Cir. 1946); *People of Puerto Rico* v. *United States*, 132 F.2d 220 (1st Cir. 1942); *United States* v. *16 Acres of Land*, 47 F.Supp. 603 (D. Mass. 1942); *United States* v. *2,086 Acres of Land*, 46 F.Supp. 411 (W.D. S.C. 1942); *United States* v. *2,184.81 Acres of Land*, 45 F.Supp. 681 (W.D. Ark. 1942). Various reasons have been advanced in support of this rule. 2 Nichols, The Law of Eminent Domain, §§5.221 and 5.221[1] (3rd ed., 1976). One view holds that the condition upon which the reverter is based has been made impossible to perform by operation of law, so that compliance is excused and no forfeiture results. *Woodville* v. *United States, supra.* Another view is that "there is no interval of time between the seizure of the rights of the grantor during which there could be a reverter of title to the latter. . . ." 2 Nichols, *supra* at 116. A third view is that, at the time of condemnation, the possibility of reverter is not an interest in land and thus is not compensable under the Constitution. *Woodville, supra.*

The government relies on all these arguments, contending that at the time it went into possession defendants' possibility of reverter had not ripened and therefore it was terminated as a matter of law, or in the alternative, that it was not compensable under the Fifth Amendment. Defendants' position is that this line of authority does not apply in situations where the possibility of reverter ripened before the initiation of condemnation proceedings. They state that there was no legal compulsion for the State to transfer the property and thus the enactment of Public Act No. 359 and the subsequent agreement of May 1, 1975, which transferred jurisdiction over the property to the United States, where voluntary acts which violated the condition in the deed, terminated the State's estate in fee simple defeasible, and vested title in them.

In reviewing the authorities which support the government's position, this court has found that all involve situations where the condemnor had legal authority to seize the property, and the property owner had no option but to surrender it under threat of condemnation. None of these situations involved instances where the property owner was under no legal compulsion to surrender the property, but went ahead and did so. This distinction is important.

Where property is threatened with imminent condemnation, much of a landowner's conduct *vis a vis* the condemnor is involuntary since it is motivated by the knowledge that he soon will be divested of his estate. Thus, where he enters into preliminary negotiations, or takes other necessary steps to effectuate a transfer so that the initiation of formal condemnation proceedings can be avoided, he is in all likelihood only attempting to make his transfer go as smoothly and predictably as possible so that the cloud of uncertainty is removed and he can begin to plan for the future. In these instances, this court does not believe it would be fair or equitable to hold that such acts could trigger a possibility of reverter, nor should a court look to these acts in determining if the event upon which the fee simple defeasible is to end is imminent. *See, Midwestern Developments, Inc.* v. *City of Tulsa*, 374 F.2d 683 (10th Cir. 1967).

Where property is not threatened by condemnation, then this court believes a different rule should apply. In these instances, if the landowner can continue to comply with the condition in the deed he should do so. If he proceeds to take steps to transfer the property to a condemning body, but does so under no legal compulsion, then these steps could be sufficient to cause the possibility of reverter to ripen. A court need only examine the landowner's conduct and determine if it violates the condition in the deed.

In analyzing the claims of the present parties, this court begins with 16 U.S.C. §460x-7 which sets out the methods by which the Secretary of Interior may acquire land within the Lakeshore area. Section 460x-7(c) provides that "[a]ny property, or interests therein, owned by the State of Michigan or any political subdivision thereof, may be acquired only by donation." This means that the United States could not initiate condemnation proceedings to take any State-owned interest in the area of the Lakeshore.[2] It, instead, had to hope that the State, through its own largesse, would voluntarily come forward and surrender its property. If the State refused to donate, the United States would appear to have no recourse but to let it keep the property.

This means that at no time did the subject property ever face the threat of condemnation. If the State had wished, it could have continued operating it as a park. This absence of any legal compulsion to surrender the property means that defendants have correctly characterized the enactment of Public Act No. 359 and the agreement of May 1, 1975 as voluntary acts on the part of the State to relinquish its interest in the subject property. Consequently, this court rejects the various arguments put forward by the United States that its acquisition made the possibility of reverter legally impossible to perform, or that its acquisition of the fee left defendants with a non-compensable interest in the property, or that there was no interval of time between the acquisition of the grantee's estate and the rights of the grantor. As has just been noted, these arguments would be sustainable if the property had been surrendered *under threat of eminent domain*, but they have no merit where the government acquired the property as a result of a voluntary

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[2] In the instant proceeding, the government has only sought to condemn the reversionary interest of the Days' heirs. The State of Michigan is not a party, and "Schedule B," attached to the complaint in condemnation, states that the State's interest is not being condemned.

transfer which was not motivated by such a threat. *Cf.*, *Sherman* v. *Town of Jefferson*, 113 NE. 624 (Ill. 1916).

It is thus necessary to determine if the State's actions violated the condition which the Days placed in the deed. The standard for this court's review has been correctly set forth by the government in its brief.

It is well settled that conditions such as that in the instant case are disfavored in Michigan and, therefore, are strictly construed so as to prevent forfeiture. *Clark* v. *City of Grand Rapids*, 334 Mich. 646, 654 (1952); *Central Land Co* v. *City of Grand Rapids*, 302 Mich. 105, 112 (1942). Before a forfeiture will be declared, a court must find a "real and substantial violation" of the condition embodied in the deed. *Central Land Co.*, *supra*, at 110, 113. In determining if such a violation has occurred, "consideration should be given to the purpose obviously sought to be accomplished by the condition. . . ." *Id.*, at 110. A violation will only be found if there has been a "substantial degree" of interference with this purpose. *Id.*, at 113.[3]

This test was applied in *Central Land Co.*, *supra*, in which a deed to the City of Grand Rapids contained the following condition:

> [to] be used solely for park, highway, street or boulevard purposes; and if any part thereof be not used for any such purposes, . . . or at any time be used for any other purpose, said part or parts shall immediately revert to the grantor, its successors or heirs. . . .

Despite this unambiguous language, the Michigan Supreme Court found no violation when the City allowed

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[3] *Baldwin Manor, Inc.* v. *City of Birmingham*, 341 Mich. 423 (1954) is not to the contrary, because the park was being converted into a road, a use which could substantially interfere with the donor's intended purpose.

oil drilling on the park land. Its decision was based on the ground that this activity did not "materially impair the use of the land for purposes for which it was conveyed to the city." *Id.*, at 110.

In the instant case, defendants rest their arguments on the express words of the deed, pointing out that a state park is not the same as a national park because each is controlled by a different entity, which is responsive to different interests. The government states that the difference between a state and national park is insubstantial, for both serve the same purpose. It thus does not believe that the grantors' purpose would be frustrated by having the management of the park shift to the United States.

In cases such as this, where the grantor is dead and a lapse of time may have caused others' memories to fade, it is sometimes difficult to ascertain the purpose which a grantor sought to accomplish by inserting a condition in a deed. Such is the case with the instant grant of property from the Days to the State of Michigan. Believing that this purpose might become clearer if the grant was studied in its historical context, this court has undertaken an examination of the history of the state park movement in the United States, and particularly in Michigan.

Parks have not always been a part of this country's heritage. During our first century, there was little need for parks as man's life was essentially tied to the out-of-doors through hunting, ranching, and farming. In this second century, however, people in increasing numbers have traded the farm life for the city and have been separated from that vitalizing contact with nature which had once been so easy and implicit in the national life.

The need for preserves was felt—places which would preserve the best of our natural environment before it was destroyed by the encroachment of our cities and the needs

of industry, and which would also provide a place where the public could retreat to renew its ties with nature. In 1857, Central Park was created in New York City. It was not until 1872, however, that purely scenic treasures were set aside. In that year, the Congress established Yellowstone as the first national park in the world. Its success led to the creation of more national parks, such as Sequoia, Yosemite, and Mount Ranier.

During the 1880's and 1890's, several states began to establish state parks to provide places of recreation for their citizens and to preserve places that might otherwise be destroyed. A fear that all the seashore, mountaintops and river banks might soon be in private hands led the Massachusetts Legislature *to begin acquiring valuable park lands, and to encourage that gifts be made of lands held by private persons.*[4] In 1883, the State of New York created the Niagara State Reservation and the Adirondack State Reservation, then followed this with other parks in the Catskill Mountains and at Watkins Glen and Stoney Point.[5] During this same period, Minnesota began to acquire the nucleus for its present state park system,[6] and in 1903 the governor of Wisconsin appointed a three-member commission to study the State's resources and determine what should be acquired for parks.[7]

Michigan was another state which pioneered the development of state parks. In 1895, the State acquired its first state park when the federal government surrendered its

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[4] "Parks and Recreation Facilities in the United States," *Annals of the American Academy*, Vol. 35, at 221-222 (March 1910).

[5] *Id.;* W. Nelson, "The Development of State Parks in America," *The Playground*, Vol. 21, p. 630 (March 1928) [hereinafter Nelson].

[6] Nelson, p. 630.

[7] "Park and Recreation Facilities in the United States," *Annals of the American Academy*, Vol. 35, pp. 221-222 (March 1910).

military reservation on Mackinac Island.[8] The Legislature established the Mackinac Island State Park and a Board of Commissioners was appointed to administer the park.[9] In 1909, the Legislature created Michilimackinac State Park, incorporating the site formerly occupied as a military post under the name of Fort Michilimackinac in the village of Mackinac City, and placed it under the control of the Board of Commissioners.[10] Both of these were on sites where rail and steamship lines merged and this helped to attract visitors.[11]

Despite these early advances, the state park movement had not yet taken hold, for in 1908 the number of states possessing their own parks numbered less than a dozen.[12] Growth was beginning to occur, in part caused by the growing number of individuals with automobiles and an improved system of roads.[13] Those trapped in the city were no longer confined to points along a rail or water line, but could now venture out into remote areas. Since most had limited time and money, most trips had to be limited in distance, and this gave great impetus to the establishment of regional parks.

In many states, including Michigan, this forced lawmakers to realize that the outstanding features of their state had to be protected or they might be lost to private hands or

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[8] State Parks of Michigan—"A report of the past—a look to the future," p. 15 (published by Michigan Department of Conservation, 1957) [hereinafter referred to as *State Parks of Michigan*]; E. Petersen, "Wildlife Conservation in Michigan,' 44 Michigan History at p. 142 (June 1960).

[9] *State Parks of Michigan*, p. 15.

[10] *Id.*

[11] *Id.*

[12] Nelson, P. 631.

[13] *State Parks of Michigan*, p. 15; "At the Conventions," *The Playground*, Vol. 17, p. 629 (March 1928).

destroyed.[14] In 1917, when the great pine forests of Michigan were largely a memory, the Legislature authorized the purchase of 200 acres of land near Interlochen to preserve a stand of virgin pine that had escaped cutting, and placed it under the supervision of the Public Domain Commission.[15]

By 1918, the number of states with parks still numbered less than twenty,[16] but a vision of a great recreational industry was taking form and the need for greater park services was becoming recognized.[17] *States were pressuring the federal government to establish national parks within their borders*—many in areas that did not have national significance.[18] By 1921, there still were only 19 states with parks, and 29 without, and of those possessing state parks, six had only one.[19] Sparked by the knowledge that the nation's resources needed to be preserved and that the increasingly urbanized population needed areas for recreation, Stephen Tying Mather, Director of National Parks, helped organize a meeting of conservationists in an attempt to have states establish their own parks.[20] A group of 200 met in January 1921 at De Moines, Iowa and "[f]rom that January meeting emerged a movement toward the creation of *systems* of recreation areas within the states which *would be comparable in purpose, in choice, in administration, and in resultant benefits to what on the national scale was the purpose and achievement of the National Park System.*[21]"

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[14] R. Dodge, "Michigan," Parks and Recreation, p. 37 (December 1970).

[15] *State Parks of Michigan*, p. 15.

[16] Nelson, p. 629.

[17] F. Tilden, *The State Parks–Their Meaning in American Life*, p. 3 (Alfred A. Knopf, 1962) [hereinafter Tilden]; *State Parks of Michigan*, p. 15.

[18] Tilden, at pp. 4-5.

[19] *Id.*, pp. 1, 5.

[20] *Id.*, pp. 3-9.

[21] *Id.*, p. 4.

Emphasis supplied.) The result was the creation of the National Conference on State Parks. By 1926, the work of these state park enthusiasts had had a cumulative effect for the number of states with parks had grown to 35 and 8 other states were studying programs for parks.[22]

In Michigan during these post-war years, a similar movement seems to have taken hold. The early parks were serving their purposes well enough, but were limited to the specific sites established.[23] There was a need for a comprehensive statewide system and, in response, legislation was enacted in 1919. By Act 218 of the Public Acts of 1919, the Legislature created a Michigan State Park Commission and defined its scope, authority and duties:

> Sec. 4. Said commission shall have charge and supervision of all lands acquired by the state as public parks for the purposes of public recreation or the preservation of natural beauty or historic association, except such lands as may be placed by law in the charge and under the supervision of other commissions or officials. . . .
>
> Sec. 5. Said Commission—shall be authorized to take in the name of the state and for the benefit of the public, by purchase, condemnation, gift or devise, lands and rights in lands for public parks, ...

Governor Albert Sleeper approved the bill on May 12, 1919 and appointed the first Michigan State Park Commission of 10 members on January 9, 1920.[24] Among the commissioners was Mr. David H. Day, who was named

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[22] *Id.*

[23] R. Torrey, "State Park Survey," *The Playground*, Vol. 19, p. 621 (February 1926).

Thirty-three states had state parks and forests. Two others had parks which were managed by city or metropolitan agencies but which were the equivalent of state parks.

[24] *State Parks of Michigan*, p. 15.

chairman of the Commission.[25] That same year, Mr. Day and his wife deeded the property now in question to the State.[26] This land became the first state park established by the Commission.[27] During the term of its two year tenure, the Commission acquired some 22 other sites, 21 of which were acquired by donation, and one, Interlochen State Park, was transferred by the Public Domain Commission.[28]

The concept of state parks in Michigan, as set forth in Public Act 218, has been carried forward in subsequent state park legislation.[29] The *fundamental purpose is still to preserve property for recreation and for its natural beauty, or historic association.*

In examining this history, it is apparent that the state park movement throughout the country, and in Michigan, was prompted by a desire to preserve the precious examples of our country's scenic, natural, and cultural heritage so that present and future generations would always have places for recreation and inspiration. This is best seen in the specific language of Act 218, section 4, of the Public Acts of 1919, which established the State Park Commission to preserve lands for the public. This was significant and novel legislation, and it could only succeed if the commissioners, as individuals, were fully dedicated to the concept that areas of the State must be preserved for their natural beauty and for purposes of public recreation. That Mr. Day was chosen chairman of this auspicious group of commissioners, indicates that he was one of the most deeply committed to preserving areas for public enjoyment. When this is coupled with the fact that he donated the subject property during his tenure as a commissioner, a capacity in

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] M.C.L.A. §§318.3-.8.

which he was to acquire property "for the purposes of public recreation or the preservation of natural beauty or historic association . . . ," it leads this court to conclude that his primary purpose in donating it was to preserve a beautiful piece of Lake Michigan's shoreline so that everyone would be able to experience the beauty with which nature had endowed this area.

In analyzing the Days' reasons for specifying that the property be used as a "state" park, it is logical to assume that they were, in part, motivated by a desire to bolster the fledgling state park system which Mr. Day was to oversee. The fact that their donation was the first also indicates that they intended to set an example for others so that they would act in a similar and unselfish way. It does not seem to have been prompted by any distrust of the United States or the National Park Service, particularly since section 5 of Public Act No. 218 permitted the State Park Commission to receive property from the United States to help it build its park system.

It is this court's opinion that while the Days wanted this property used as a state park, this desire was secondary to their primary purpose of making a gift to all the people of the State so that they could enjoy and use the property. It would be inconsistent with this intent, and with the general spirit of Public Act No. 218, that the people of the State should lose the property merely because there has been a change of governmental management. Certainly most donors are not so chauvinistic that they value the state who manages the property above the public who benefits from it. Generally, it is the public who comes first, and in the absence of demonstrative evidence to the contrary, this court will presume that the public's benefit was uppermost in the Days' minds.

Using this property as a national park has not, at present, materially or substantially interfered with the Days' primary intent that the property be preserved as a park for the public's use and enjoyment. Minor changes have been

made to existing facilities, but the property is still being used as a public campground, just as it was when the state operated it. In addition, the United States has continued to name the campground after Mr. Day, thus preserving any intention he may have had to have the property serve as a memorial to himself.

Since there has been no significant impairment of the grantors' intended purpose, this court holds that defendants' possibility of reverter did not ripen when the State of Michigan voluntarily transferred jurisdiction of the park to the United States.

Dated: April 7th, 1980.

(s) Noel P. Fox,
Senior Judge
United States
District Court
Western District of
Michigan

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

Gerald H. Liefer,
Clerk

ORDER
(Filed: April 7, 1980)

For the reasons stated in the attached opinion, this court holds that defendants' possibility of reverter did not ripen when the State of Michigan voluntarily transferred jurisdiction of the subject property to the United States. Thus, these defendants do not possess the fee title to the property and have no claim to the proceeds of condemnation.

Defendants' motion for partial summary judgment is denied. Plaintiff's cross-motion for partial summary judgment is granted.

IT IS SO ORDERED.

Dated: April 7, 1980.

(s) Noel P. Fox,
Senior Judge
United States District Court
Western District of Michigan

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

Gerald H. Liefer,
Clerk

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 80-1750

In the Supreme Court of the United States

OCTOBER TERM, 1980

31.72 ACRES OF LAND, MORE OR LESS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
THOMAS L. RIESENBERG
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a possibility of reverter ripened into title when jurisdiction of property granted to the State of Michigan in 1920 for use as a "public state park" was transferred to the United States for continued use as a park.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-2a) and of the district court (Pet. App. 3a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1981. The petition for a writ of certiorari was filed on April 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This suit was commenced by the United States in order to determine the validity of the claim of the heirs of David H. Day and Eva E. Day that their reversionary interest in 31.72 acres of land ripened into fee title (Pet. App. 1a). The land at issue is within the boundaries of the Sleeping Bear Dunes National Lakeshore, which was established by the Act of

October 21, 1970, 16 U.S.C. 460x *et seq.* (Pet. App. 2a). The Days had conveyed the land to the State of Michigan in 1920 by a warranty deed that provided that the land was (*id.* at 1a)

> to be used for a public state park, should the same be abandoned for that purpose, it shall revert to the party of the first part, their heirs and assigns.

The State of Michigan authorized the Michigan Department of Natural Resources to convey the subject land by quitclaim deed to the United States. 1974 Mich. Pub. Acts No. 359, Mich. Comp. L. § 3.901 (Mich. Stat. Ann. § 13.766(1) *et seq.*) (Callaghan 1980 Supp.). However, no such deed was executed prior to the commencement of this proceeding (Pet. App. 4a).

On May 1, 1975, the State of Michigan issued a permit granting jurisdiction over the parkland to the National Park Service in connection with the operation of the Sleeping Bear Dunes National Lakeshore. This permit authorized the National Park Service to make use of the property as if a deed had been delivered, although the State did not relinquish title to the property. The term of the permit was for one year and year-to-year thereafter until terminated by delivery of the deed (Pet. App. 5a). The condition precedent to delivery of a deed was the satisfactory removal of the remainderman interest reserved by the Days in the original deed (*id.* at 2a, 5a).

With the exception of certain minor changes such as the removal of some signs, buildings, and fixtures in the park, the United States has left the facilities intact. Operation of the park also remains largely unchanged, with the United States continuing Michigan's policy of charging fees to camp at the park. The park was known as the "D.H. Day State Park" when it was managed by Michigan; it is now

called the "D.H. Day Campground" within the Sleeping Bear Dunes National Lakeshore (Pet. App. 2a, 5a n.1, 17a-18a).

The complaint in this case excepted the interest of the State of Michigan and various easements and, for practical purposes, concerned only the reversionary interest asserted by the heirs of the Days (J.A. 4).[1] After a stipulation of facts was submitted (J.A. 18-23), the heirs filed a motion for partial summary judgment on the ground that the land was no longer being used as a "public state park" and therefore that they held "a reversionary fee simple interest" (J.A. 24-26). The government filed a cross-motion for summary judgment (J.A. 27).

The district court granted the government's motion for summary judgment, holding that the possibility of reverter under the original deed did not ripen into title in favor of the heirs when the State transferred jurisdiction of the park to the United States (Pet. App. 3a-18a). Based on a review of Michigan law (*id.* at 10a-11a) and "exhaustive research * * * [into] the historical context in which the grant was given [to the State of Michigan in 1920]" (*id.* at 2a), the court found that the action of the State in transferring control of the property to the National Park Service did not violate the condition that the Days placed in the 1920 deed for the primary purpose of preserving the land as a public park (*id.* at 10a, 17a-18a).

The court of appeals affirmed by order (Pet. App. 1a-2a). In light of "well-settled Michigan law" (*id.* at 2a), the court of appeals sustained the district court's determination that the transfer of jurisdiction did not interfere materially with the Days' primary intent to make a gift of the land so that the people of the State could enjoy and use the property as a park (*ibid.*).

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[1] "J.A." refers to the joint appendix filed in the court of appeals.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Moreover, resolution of this case turns largely on the factual issue of the intent of the Days in 1920, and the only disputed legal issue involves a question of state law. Accordingly, further review is unwarranted.

A long line of Michigan cases relied upon by the district court (Pet. App. 10a) holds that conditions in deeds are strictly construed to prevent forfeiture. Contrary to petitioners' assertion (Pet. 6-11), this well-established principle was not altered by the decision in *Baldwin Manor, Inc.* v. *City of Birmingham*, 341 Mich. 423, 67 N.W. 2d 812 (1954).[2] There, the court held that the building of a highway over parkland constituted a breach of the condition imposed by the donor that the land be used solely for park purposes. In the instant case, on the other hand, the courts below found that the transfer of management of a park from the State to the federal government did not materially or substantially interfere with the grantor's purpose. The holding in this case is not inconsistent with governing state law.

Nor is a different result required by this Court's decision in *Evans* v. *Abney*, 396 U.S. 435 (1970). At issue in that case was a will that conveyed property in trust to a city for use as a public park exclusively by white people of that city. In *Evans* v. *Newton*, 382 U.S. 296 (1966), this Court found that the condition requiring operation of the park on a racially discriminatory basis violated the Fourteenth Amendment to the United States Constitution. The Supreme Court of Georgia then ruled that the testator's condition had become impossible to fulfill, that the trust therefore failed, and that the property consequently reverted by operation of Georgia law to the testator's heirs. This Court, in

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[2]The district court specifically considered and distinguished the *Baldwin Manor* decision (Pet. App. 10a n.3).

rejecting constitutional challenges to that decision, observed that the state court "did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will" (*Evans* v. *Abney*, *supra*, 396 U.S. at 439). Similarly, the courts in the present case did no more than follow well-established Michigan law in concluding that the condition in the original deed was not violated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
THOMAS L. RIESENBERG
Attorneys

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